

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID MONROE BAUMANN,

Defendant - Appellant.

No. 05-15634

D.C. Nos. CV-04-02680-JW
CR-00-20297-JW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Submitted December 5, 2005^{**}

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges

Federal prisoner David Baumann appeals pro se the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for second degree murder. He contends that under *United States v. Booker*, 125 S. Ct. 738 (2005), and *Blakely*

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

v. Washington, 542 U.S. 296 (2004), the district court violated his constitutional rights in enhancing his sentence based on judge-found facts. This contention is foreclosed because *Booker* does not apply retroactively to convictions that became final prior to its publication. *See United States v. Cruz*, 423 F.3d 1119, 1119-20 (9th Cir. 2005) (per curiam).

AFFIRMED.